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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 665

W. L. KANN AND STELLA H. KANN, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 8a-29a) are reported at 18 T.C. 1032. The opinion of the Court of Appeals (R. 136-151) and its opinion denying rehearing (R. 187) are reported at 210 F. 2d 247.

JURISDICTION

The judgments of the Court of Appeals were entered on December 31, 1953. (R. 151, 152.) On January 14, 1954, the Court of Appeals extended the time for filing petitions for rehearing to and including February 1, 1954. (R. 154.) A consolidated petition for rehearing, filed on February 1, 1954 (R. 155-186), was denied on February 15, 1954 (R. 188). The petition for a writ of certiorari was filed on March 30, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals, affirming the Tax Court, correctly held that taxpayers Gustave H. Kann and W. L. Kann received taxable income when they surreptitiously procured for their own use funds from family owned corporations in which they were the principal officers and directors and over which they exercised complete voting control through stock ownership and proxies.

2. Whether the Court of Appeals, affirming the Tax Court, correctly held that taxpayer Stella H. Kann filed joint returns with her husband for 1937 and 1938 and that she was liable for deficiencies and fraud penalties for these years.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and Regulations are printed in the Appendix, *infra*, pp. 17-21.

STATEMENT

The facts, as found by the Tax Court (R. 9a-27a) and as summarized by the Court of Appeals (R. 136-137, 140-144), may be stated as follows:

During the taxable years 1936 to 1941, inclusive, taxpayers Gustave H. Kann[1] and W. L. Kann, brothers, were officers, directors and shareholders of Pittsburgh Crushed Steel Company (hereafter referred to as PCS), a Pennsylvania corporation. Gustave H. Kann was president; W. L. Kann, secretary and treasurer. Together they had exclusive control of the management of the company. During all the years in question they owned directly more than 20 percent of the PCS stock. With the exception of the year 1936, the Kann family group owned, directly or beneficially, at least 90 percent of the PCS stock. Through the right to vote their mother's stock and as majority trustees of a family trust, taxpayers exercised voting control of the majority of the stock. (R. 9a-14a, 16a, 142.)

During the period in question, taxpayers were also officers and directors of the Globe Steel Abrasive Company (hereafter referred to as GSA), an Ohio corporation which was a wholly owned subsidiary of PCS. Gustave H. Kann was president; W. L. Kann, vice-president. (R. 19a, 137.)

By virtue of the positions which they occupied in and the control which they exercised over these family corporations, during the period 1936-1941, inclusive, the taxpayers caused payments totaling

[1] Subsequently, Gustave H. Kann died and the executors of his estate were duly substituted as petitioners in the Tax Court. (R. 7a.)

$675,881.76 to be made to them out of the funds of PCS. These payments were concealed on the corporate books, which were kept by W. L. Kann, by false and fictitious entries which understated sales and overstated purchases. The payments were made to the taxpayers by means of checks of the corporation and by overstated credits in their personal accounts. During the same period the taxpayers caused payments totaling $66,000 to be made to them out of funds of GSA. These payments were made by checks drawn on GSA but which did not appear on its books and were concealed as understated sales by taxpayers with the assistance and cooperation of the GSA secretary and general manager and its bookkeeper. (R. 16a-21a, 27a, 137.)

The taxpayers did not report any of these payments as income. In addition to the above sums, during this period taxpayers, with intent to evade and defeat tax, failed to report $151,015.50, representing dividends received from Steelblast Abrasives Company, a corporation. (R. 16a, 20a-21a.)

Sometime in late 1942 or early 1943, a certified public accountant's audit of the PCS books revealed the concealed payments to the taxpayers. Accounts receivable were thereupon set up which reflected these amounts and, during 1943, 1944, 1945, and 1946, a total of $251,779.07 appeared on the books as having been paid by the taxpayers on these accounts. Similar accounts were set up on the books of GSA. According to the minutes of a meeting of the board of directors of PCS held

on September 15, 1947, Gustave H. Kann disclosed the "unauthorized withdrawal" of these funds during the years 1936 to 1941, inclusive, by the taxpayers "for their own use" and a resolution was adopted to the effect that the company accept a demand note from taxpayers for the balance due without interest, secured by an assignment of their PCS stock. The Tax Court found, and the Court of Appeals agreed, that the details of the supposed liability to repay were such as to leave serious doubt whether the whole project was not a false front erected to deceive the Commissioner of Internal Revenue and not the corporation or its stockholders. (R. 21a-23a, 27a-28a, 60a-61a, 141.)

On November 25, 1947, the directors of PCS approved a loan of $12,500 to taxpayers. On August 17, 1948, following Gustave H. Kann's conviction and sentence to imprisonment for willfully attempted evasion of corporate taxes, the stockholders of PCS voted him a leave of absence, with pay. Taxpayers continued as officers and directors of PCS and GSA at least through 1951, and at substantial salaries. In 1944, when the offices of secretary and treasurer of PCS were separated, W. L. Kann was elected vice-president and treasurer. Paul McConnell, who was secretary and general manager of GSA from 1936 to 1941, inclusive, and who knowingly participated in the previously described payments of funds from that corporation to taxpayers, remained thereafter with the company as its general manager. (R. 25a-26a, 86a, 118a.)

The Tax Court sustained the Commissioner's determination that the taxpayers had received taxable income in the years in which they received these payments from the corporations and the Court of Appeals affirmed. (R. 27a-29a, 144.)

For the taxable years 1937 and 1938, the returns signed by W. L. Kann contained, in the space provided for the name and address of the taxpayer, the names "W. L. Kann and Stella H. Kann." The explanatory language printed on the returns under their names was as follows (R. 26a): "(Name) (Both husband and wife, if a joint return)." The answer "Yes" was given to the question on the returns: "Are items of income or deductions of both husband and wife included in this return?" Stella H. Kann did not testify. W. L. Kann did not contend in his testimony that he signed the returns for his wife without her consent. The Tax Court found that the returns in question were joint returns and held that Stella H. Kann was liable for the deficiencies and fraud penalties assessed for those years. The Court of Appeals affirmed. (R. 8a, 28a-29a, 143-144.)

ARGUMENT

1. The decision below, holding that the taxpayers received taxable income when they caused the payments in question to be made to them by these family corporations, is correct and embodies a proper application of established principles. The money received by the taxpayers during the taxable years was taken under a claim of right, for the taxpayers, as they themselves described the matter (R. 23a),

took the funds "for their own use" and they intended to and did exercise full dominion and control over the money. "There is a claim of right when funds are received and treated by a taxpayer as belonging to him." *Healy* v. *Commissioner,* 345 U. S. 278, 282. Such an asserted ownership, even though "assailable by someone with a better title" (*Rutkin* v. *United States,* 343 U.S. 130, 137), supports the conclusion that taxable income has been realized within the broad definition of Section 22 (a) of the Internal Revenue Code and the Revenue Acts of 1936 and 1938 (Appendix, *infra,* pp. 17, 18-19). *North American Oil* v. *Burnet,* 286 U.S. 417; *United States* v. *Lewis,* 340 U.S. 590; *Rutkin* v. *United States, supra; Healy* v. *Commissioner, supra.* See also *Commissioner* v. *Wilcox,* 327 U.S. 404, 408.

Whether the taxpayers did or did not procure these gains by a legal taking is not material, for income illegally received is nonetheless taxable when claimed by the recipient as his own. *Rutkin* v. *United States, supra,* and cases cited in footnote 8, p. 137. See also *United States* v. *Chapman,* 168 F. 2d 997 (C.A. 7th), certiorari denied, 335 U.S. 853, and *United States* v. *Currier Lumber Co.,* 70 F. Supp. 219 (D. Mass.), affirmed, 166 F. 2d 346 (C.A. 1st). Nor is it significant, in determining whether income was received, that the taxpayers undertook the repayment of part of the funds to the family corporations after the concealed payments came to light. The duty to repay to someone having a superior right does not negate the realization of

income in the year of receipt, and this doctrine, which springs from the annual accounting system of the tax laws, applies with equal force to all taxpayers alike, with no preferential exemption for those who receive income unlawfully. *North American Oil* v. *Burnet,* 286 U.S. 417; *United States* v. *Lewis,* 340 U.S. 590, rehearing denied, 341 U.S. 923; *Rutkin* v. *United States,* 343 U.S. 130; *Healy* v. *Commissioner,* 345 U.S. 278.

2. There is no conflict in decisions requiring resolution by this Court. While the taxpayers assert that the decision below is in conflict with *Commissioner* v. *Wilcox,* 327 U.S. 404 (Pet. 20-32), and that the court below erroneously concluded that *"Rutkin overruled Wilcox"* (Pet. 32), neither assertion is warranted. The Court of Appeals did not treat *Wilcox* as an overruled case. This is quite obvious from the extended analysis (R. 140-143) in which it concluded that there were important distinctions between this case and *Wilcox* and that the present case was governed by the broader doctrine of *Rutkin.* Since this Court in *Rutkin* (p. 138) specifically stated about *Wilcox* that "We limit that case to its facts", the Court of Appeals was altogether correct in examining with care the distinguishing features that set *Wilcox* apart. See *National Carbide Corp.* v. *Commissioner,* 336 U.S. 422, 427-433, where this Court similarly pointed to every possible factual difference that served to distinguish *Southern Pacific Co.* v. *Lowe,* 247 U.S. 330, another case that had been previously limited to its facts.

An analysis of *Wilcox* and of the different facts of this case demonstrates that the courts below were correct in holding that *Wilcox* does not govern here and that there is no conflict between the two cases.

In *Wilcox,* the taxpayer was a salaried bookkeeper and had no other relationship to his employer. Here, however, the taxpayers were principal officers and directors of PCS and GSA. (R. 16a, 19a, 136-137.) They directly owned more than 20 percent of the PCS stock (R. 10a, 142) and, through the right to vote their mother's stock (R. 16a), and as majority trustees of a family trust (R. 12a-14a), exercised voting control of the majority of the PCS stock and of the stock of GSA, its wholly owned subsidiary (R. 19a, 137). In all of the years in question, the Kann family group, which owned at least 90 percent of the PCS stock (R. 9a-11a), effectively left to the taxpayers the actual conduct of the corporate businesses. As found by the Tax Court, the taxpayers exclusively managed the operations of PCS (R. 16a) and controlled PCS and GSA (R. 26a-27a) "through stock ownership, family relationships, and their positions as directors and officers" and "caused the amounts received by them from PCS and GSA *** to be paid by virtue of their control ***." W. L. Kann kept the books and records of PCS and made the false entries to cover the withdrawals (R. 19a), and, in connection with the falsification of the GSA records, employees of that corporation accepted instructions from the taxpayers just as

though these instructions emanated from officers empowered to issue them (R. 21a). It is thus obvious that here—in contrast to the situation in *Wilcox*—the affinity of the taxpayers to the corporations and their ability to shape the corporate will, as both lower courts in effect held, negated any clear hypothesis of embezzlement. Cf. *United States* v. *Currier Lumber Co.*, 70 F. Supp. 219 (D. Mass.), affirmed, 166 F. 2d 346 (C.A. 1st), and *United States* v. *Chapman*, 168 F. 2d 997 (C.A. 7th), certiorari denied, 335 U.S. 853.

Furthermore, in *Wilcox* the taxpayer was convicted of embezzlement and was serving a prison term. Here, there was no such external evidence of embezzlement. Indeed, the taxpayers themselves, despite later attempts at self-incrimination, originally characterized their activities merely as an "unauthorized withdrawal." (R. 23a.) They were never indicted or convicted of the alleged embezzlement, and nothing in the record would make it appear that those concerned with the corporate affairs of PCS or GSA, or anyone else, ever urged prosecution. (R. 140.) On the contrary, the reaction of the other stockholders and directors, following the disclosure of the withdrawals, was hardly that of victims of embezzlers; rather, it strongly suggested, as both courts below agreed, that the method and acts of the taxpayers had been forgiven or condoned. (R. 27a, 141.) Thus, although the Tax Court had found (R. 28a) that the taxpayers were "obviously in a financial position to make good * * * [their] defalcations"—another

factor distinguishing this case from *Wilcox*—, they were permitted in 1947 to execute a note for the balance of the amount owing PCS, without interest (R. 23a-24a); in the same year, PCS granted them a loan of $12,500; in 1948, following his conviction and sentence to imprisonment for evasion of the corporation's taxes for 1940 and 1941, the stockholders of PCS granted Gustave H. Kann a leave of absence, with pay (R. 26a, 141); and, at least through 1951, both taxpayers continued as principal officers, at substantial salaries (R. 25a). Finally, the steps taken by the taxpayers to repay the corporations, following revelation of the withdrawals by an accountant's audit in late 1942 or early 1943, did not require a finding that there had been embezzlements.

Both courts below agreed that the details of the supposed liability to repay were "such as to leave serious doubt whether the whole project was not a false front erected to deceive not the corporation nor its stockholders but the Commissioner of Internal Revenue." (R. 27a-28a, 141.) The fact that partial repayments were made in subsequent years does not impair the validity of the conclusion that income was realized in the earlier year of receipt. *North American Oil* v. *Burnet*, 286 U.S. 417; *United States* v. *Lewis*, 340 U.S. 590; *Healy* v. *Commissioner*, 345 U.S. 278. Nor did the taxpayers' testimony that they had stolen the money require acceptance of their contention that embezzlements had taken place. They were obviously interested parties, "self-confessed deceivers and de-

frauders", and one of them was an ex-convict. (R. 28a, 141.) The Tax Court was not bound to accept the truth of their testimony. *Quock Ting* v. *United States,* 140 U.S. 417, 420-422.

There is a further distinguishing factor between this case and *Wilcox.* In *Wilcox,* this Court assigned as one of the reasons for its decision the fact that if the embezzled funds were held to be income to the wrongdoer the United States would have been entitled to preference over the victim. In the present case, since the taxpayers are in a financial position to satisfy both claims, no such problem is presented. As the court below observed (R. 142), "if Wilcox is to be limited to its facts this aspect of the case assumes considerable stature."

It is pertinent to observe that in *United States* v. *Chapman,* 168 F. 2d 997 (C.A. 7th), certiorari denied, 335 U.S. 853, there was a claim that the defendant had taken funds belonging to the corporation of which he was the principal stockholder, and it was contended, as a ground for seeking review by this Court, that the decision that he had realized income by an unlawful taking was in conflict with *Wilcox.* Since *Rutkin* was decided subsequent to the denial of certiorari in the *Chapman* case, we submit that there is even less reason for the granting of review in this case.

3. There is no warrant for further review of the findings of the courts below that the taxpayers Stella H. Kann and W. L. Kann filed joint returns for 1937 and 1938 and that Stella H. Kann is liable for the so-called fraud penalties for those years.

(Pet. 43-48.) The returns were filed in both names and it was explicitly affirmed that "items of income * * * of both husband and wife" were included therein. (R. 26a.) Furthermore, Stella H. Kann did not testify, and although W. L. Kann did take the stand, he did not contend that he had signed the returns for his wife without her consent. (R. 29a, 143.) In these circumstances, it was correctly held, in the absence of compelling evidence to the contrary, that W. L. Kann had authority to sign on behalf of his wife and that the returns were joint returns. *Commissioner v. Stetson & Ellison Co.*, 43 F. 2d 553 (C.A. 3d); *Anderson* v. *United States*, 48 F. 2d 201 (C.A. 5th); *Howell* v. *Commissioner*, 10 T.C. 859, 866, 867, affirmed, 175 F. 2d 240 (C.A. 6th); *Carroro v. Commissioner*, 29 B.T.A. 646, 650. Cf. *Manton* v. *Commissioner*, 11 T.C. 831, where the evidence established that the husband had no authority to sign on the wife's behalf.

The taxpayers' non-compliance with the literal provisions of Treasury Regulations 94 and 101, Article 51-1 (Appendix, *infra*, pp. 19-21), namely, the fact that W. L. Kann did not formally sign as agent and Stella H. Kann did not swear to the returns, did not, as the taxpayers urge (Pet. 43-44), preclude treatment of the returns filed as joint returns. These Regulations, as the Court of Appeals observed (R. 143), "are not mandatory but merely set forth a method of compliance and may be waived * * *." Cf. *Germantown Trust Co.* v. *Commissioner*, 309 U.S. 304, 310; *Zellerbach Co.* v. *Helvering*, 293 U.S. 172, 180; *Florsheim Bros. Co.*

v. *United States,* 280 U.S. 453, 462; *Commissioner* v. *Lane-Wells Co.,* 321 U.S. 219.

McCord v. *Granger,* 201 F. 2d 103, 106, 107 (C.A. 3d), relied on by taxpayers (Pet. 44), is not only a decision of the same circuit which decided the present case but is distinguishable on its facts. There the taxpayer had listed only his own name at the top of the first page of the return and in a section dealing with exemptions; the wife in fact had filed separate original and amended returns which were accepted by the Collector; and there was additional evidence showing that the husband had no prior authority to sign on behalf of his wife and that a joint return was not intended.

Since the returns in question were the joint returns of Stella H. Kann and of her husband, she was liable for the deficiencies for both years. Section 51 (b) of the Revenue Acts of 1936 and 1938 (Appendix, *infra,* pp. 17, 18). Although Section 51 (b) of the 1938 Act for the first time expressly imposed joint and several liability upon the filing of a joint return, it was merely declaratory of the previously existing rule, and there was such liability with respect to 1937 under Section 51 (b) of the 1936 Act. H. Rep. No. 1860, 75th Cong., 3d Sess., pp. 29-30 (1938) (1939-1 Cum. Bull. (Part 2) 728, 749; *Howell* v. *Commissioner,* 10 T.C. 859, 868-869, affirmed, 175 F. 2d 240 (C.A. 6th); *Moore* v. *United States,* 37 F. Supp. 136 (C.Cls.), certiorari denied, 314 U.S. 619. It was stipulated here that part of the deficiency owing with respect to both years was "due to fraud with intent to evade

and defeat tax." (R. 20a-21a, 33a, 34a.) The Commissioner therefore met his burden of proof with respect to the imposition of the so-called fraud penalty, under Section 293 (b) of the Revenue Acts of 1936 and 1938 (Appendix, *infra*, pp. 18-19). That penalty, like the so-called negligence penalty under Section 293 (a) (Appendix, *infra*, pp. 18-19), is in reality an addition to the tax which is to be collected and paid "in the same manner as if it were a deficiency" in tax. Where a joint return is filed, the liability of the wife under Section 51 (b) with respect to the additions to tax stands on the same footing as her liability for the tax. Consequently, even though she has committed no fraud herself, she is liable for the fraud addition. *Howell* v. *Commissioner, supra*, p. 869; *Boyett* v. *Commissioner*, 204 F. 2d 205, 209 (C.A. 5th). The cases cited by the taxpayer (Pet. 48) present no conflict with the decision below. They merely apply the general rule that the Commissioner must prove fraud in order to sustain the penalty addition to the tax; here, as already noted, the existence of the fraud was stipulated.

CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1954

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

SEC. 51. INDIVIDUAL RETURNS.

* * * * *

(b) *Husband and wife.*—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

* * * * *

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, * * *.

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, * * *.

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 51. INDIVIDUAL RETURNS.

* * * * *

(b) *Husband and Wife.*—In the case of a husband and wife living together the income of each (even though one has no gross income) may be included in a single return made by them jointly, in which case the tax shall be computed on the aggregate income, and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a non-resident alien.

* * * * *

Section 22(a) of the Internal Revenue Code, applicable to the taxable years 1939 to 1941, inclusive, and Sections 22(a) and 293 of the Revenue Act of

1938, *supra*, applicable to the taxable year 1938, are substantially the same as the corresponding sections of the Revenue Act of 1936, *supra*.

Treasury Regulation 94, promulgated under the Revenue Act of 1936:

> Art. 51-1. *Individual returns.*—For each taxable year every single person and every married person not living with husband or wife for any part of the taxable year, whose gross income as defined in sections 22 and 116 is $5,000 or over, or whose net income as defined in section 21 is $1,000 or over, must make a return of income. * * * If the income of each is included in a single joint return, the tax is computed on the aggregated income and all deductions and credits to which either is entitled shall be taken from such aggregate income. A joint return of husband and wife may be filed only if they were living together at the close of their taxable year. If one spouse dies prior to the last day of the taxable year, the surviving spouse may not include the income of the deceased spouse in a joint return for such taxable year.
>
> The joint return of a husband and wife (if not made by an agent other than husband or wife, see article 51-2) must be signed by both spouses, except that one spouse may sign the return as the agent for the other, if the return is accompanied by a power of attorney on Form 936, authorizing such action. The spouse acting as agent shall, with the principal, assume the responsibility for making the return and incur liability for the penalties provided for erroneous, false, or fraudulent returns.

The joint return of a husband and wife must be sworn to before an officer duly authorized to administer oaths (see article 51-4) by the spouse preparing the return. The spouse who fills in the return shall be considered to have prepared the return within the meaning of this paragraph. If the return is prepared by both spouses, or is prepared by neither spouse, then both spouses shall swear to the return, except where one spouse acts for the other spouse under a power of attorney submitted on Form 936, or the return is made by an agent by reason of illness or absence, as provided in article 51-2.

* * * * *

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

Art. 51-1. *Individual returns.—(a) In general.*—For each taxable year a return of income shall be made by each citizen of the United States * * * whether or not such citizen * * * is the head of a family or has dependents—

* * * * *

(b) Joint returns.—A husband and wife, if living together at the close of the taxable year, may elect to make a joint return (see section 51 (b)), that is, to include in a single return made by them jointly the income and deductions of each, even though one has no gross income. In such a case, the tax shall be computed on the aggregate income and all deductions and credits to which either is entitled

shall be taken from such aggregate income. The liability with respect to the tax shall be joint and several. If one spouse dies prior to the last day of the taxable year, the surviving spouse may not include the income of the deceased spouse in a joint return for such taxable year. * * *

A joint return of a husband and wife (if not made by an agent other than husband or wife, see article 51-2) shall be signed by both spouses, except that one spouse may sign the return as the agent for the other, if the return is accompanied by a power of attorney on Form 936, authorizing such action. The spouse acting as agent shall, with the principal, assume the responsibility for making the return and incur liability for the penalties provided for erroneous, false, or fraudulent returns.

The joint return of a husband and wife shall be sworn to before a person duly authorized to administer oaths (see article 51-4) by the spouse preparing the return. The spouse who fills in the return shall be considered to have prepared the return within the meaning of this paragraph. If the return is prepared by both spouses, or is prepared by neither spouse, then both spouses shall swear to the return, except where one spouse acts for the other under a power of attorney submitted on Form 936, or the return is made by an agent by reason of illness or absence, as provided in article 51-2.

* * * * *

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